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United States, Common Market and International Antitrust: A Comparative Guide

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BOOK REVIEWS

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UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE. By BARRY E. HAWK. New York: Harcourt Brace Jovanovich 1979, 946 pp., $75.00, cloth.

The antitrust laws have been part of United States law for over ninety years and have received the constant and skillful attention of law review commentators, but they have been, until recently, largely ignored by "hornbook" authors. Now, however, what Williston and Corbin have done for contracts, others are seeking to do for antitrust. The past five years have seen the publication of several commendable treatises on antitrust.[1] Most of these works present a general or survey analysis on antitrust. One however, *United States, Common Market and International Antitrust: A Comparative Guide*, concentrates attention on the pecularities of international antitrust. This book by Barry E. Hawk deserves high praise. It is a treatise that will be valued by academicians, government officials, and antitrust practitioners.

Professor Hawk's book is obviously a labor of love; it began with materials compiled for his law school seminar, which explains the book's heavy emphasis on primary source material.[2] While the reliance on primary sources is a strong feature of the book, Hawk does more than simply provide us with a convenient single source compilation. His book offers a provocative analysis of the extraterritorial reach of the United States antitrust laws, a perceptive analysis of the European Common Market competition laws, and a review of the emerging international codes and guidelines. Each chapter is buttressed by an outstanding bibliography immensely valuable to scholar and practitioner. Hawk may not have intended an exhaustive treatise on the subject, but he has provided us with an excellent "hornbook" examination of existing law and

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1. *E.g.*, J. ATWOOD AND V. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1981); P. ARCEDA AND D. TUNER, ANTITRUST LAWS (1978, 1980); E. KINTNER, FEDERAL ANTITRUST LAWS (1980); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1976); *see also* A.B.A., ANTITRUST LAW DEVELOPMENTS (1975).

2. B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE, at vi-vii [hereinafter cited as HAWK].

possible future developments. The book exceeds Hawk's modest goal of "provid[ing] the reader with a working familiarity of the relevant issues."[3]

Professor Hawk has divided his book into three parts. Part One examines the applicability of the United States antitrust and related trade laws to international transactions. The European Common Market competition policy is the subject of Part Two. Here, Hawk compares and contrasts European and American policies. Part Three, which contains only twenty-seven pages, focuses on international regulation of restrictive business practices and technology transfers.

Professor Hawk's examination of the serious problems engendered by the extraterritorial application of the United States antitrust laws to transnational transactions is fundamentally sound and most welcomed. More than twenty years have passed since Kingman Brewster raised these issues in his authoritative text,[4] and Hawk addresses them immediately in his book. His analysis of the old precedents establishing the "effects" test for subject matter jurisdiction in foreign commerce is clear and provides an excellent background for the analysis of the "balance of interests" approach now emerging from recent decisions.[5] Hawk seems to favor the newer test although he questions certain aspects[6] which are "particularly troublesome."[7]

The discussion of the judiciary's use of comity, foreign sovereign compulsion, act-of-state and sovereign immunity as doctrinal limitations on the exercise of subject matter jurisdiction is helpful. Professor Hawk uncovers some problems. He criticizes the territorial limitation on the act-of-state doctrine and foreign sovereign compulsion defense as mechanical[8] and prone to unfairness.[9] Instead, he would weigh the extraterritorial aspect of the foreign government's action as but one factor in a "balancing of interests" approach.

The treatment of other related doctrines is equally rewarding. According to Professor Hawk, the relevance of *Parker v. Brown*[10] and its progeny to foreign commerce "is not at all clear."[11] Whether the constitutional bases for the *Noerr-Pennington*[12] doctrine can apply to the procurement of foreign govern-

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3. *Id.* at vii.

4. K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD, 11-12 (1958), *quoted in* HAWK, *supra* note 2, at 2-3. Brewster's work has recently been updated. *See* note 1 *supra.*

5. *See, e.g.*, Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), and Timberlane Lumber Co. v. Book of America, N.T.&.S.A., 549 F.2d 597 (9th Cir. 1977).

6. HAWK, *supra* note 2, at 42-43.

7. *Id.* at 43.

8. *Id.* at 132.

9. *Id.* at 155.

10. 317 U.S. 341 (1943). *Parker v. Brown* applied the so-called "state action" exemption — the sovereign compulsion defense.

11. HAWK, *supra* note 2, at 170.

12. The doctrine is embodied in three decisions: Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961), United Mine Workers v. Pennington, 381 U.S. 657 (1965) and California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

ment actions is "highly questionable,"[13] but other factors "support serious consideration of an extension."[14]

The publication of the book follows the promulgation by the United States Department of Justice of its Antitrust Guide for International Operations.[15] Professor Hawk refers to the Guide throughout Part One of the book which enhances his analysis of individual issues. He even suggests that "the thrust of the International Antitrust Guide is quite consistent with the decision[s]" formulating the new balance of interests test for subject matter jurisdiction.[16]

Professor Hawk finds the International Antitrust Guide desirable because its general statement of enforcement policy may eliminate some of the confusion and uncertainty which has inhibited business operation.[17] Although he feels "the Guide's period of operation has been too brief to support firm conclusions, it is already evident that, at the least, it has initiated a useful dialogue on many of the issues raised in the international antitrust area."[18] While Hawk expresses agreement, albeit not always complete agreement, with some of the Guide's positions,[19] he finds other positions taken in the Guide to be "unpersuasive,"[20] "potentially troublesome,"[21] "disingenuous,"[22] "unfortunate,"[23] and even "not unambiguous."[24] In one instance, Hawk

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13. HAWK, *supra* note 2, at 146.

14. *Id.* at 147.

15. [1977] ANTITRUST & TRADE REG. REP. (BNA), (Feb. 1, 1977), E-1 [hereinafter cited as INT'L ANTITRUST GUIDE].

16. HAWK, *supra* note 2, at 44.

17. *Id.* at 5.

18. *Id.*

19. For example, with respect to the Guide's hypothetical cases C, D, E and M, which involve joint ventures, Hawk states that "while the Discussions in these four cases may not clarify the legal ambiguities to everyone's satisfaction, they are welcome as relieving unnecessary fears on the part of business that many international joint ventures will be challenged by the Justice Department." *Id.* at 273. Although Case D is thus "welcome" Hawk also suggests it is "inconsistent" with some precedent and complains that it provides "little or no practical guidance on the cruical issue of determining at what point territorial restrictions are unlawful as part of a broader cartel scheme." *Id.* at 215-16.

Case I of the Guide which deals with exclusive grant-back licensing, provides another example of Hawk's limited acceptance. He generally finds the Discussion of Case I as "a welcome statement of the Justice Department position," but he quarrels with its application in one instance. *Id.* at 221.

20. Case J relating to foreign distribution agreements and export restraints. *Id.* at 189.

21. Case J. *Id.* at 193.

22. Case H covering the licensing of know-how by a United States company to a nonmarket (state-owned) enterprise. *Id.* at 232.

23. Case B which concerns an American company's foreign acquisitions. *Id.* at 259.

24. *Id.* at 87. Hawk here refers to the question whether the per se rules developed in domestic commerce cases should be applied with equal vigor in foreign commerce. His complaint that "[t]he International Antitrust Guide is also not unambiguous" is directed toward the GUIDE'S position that:

> The rule of reason may have a somewhat broader application to international transactions where it is found that (1) experience with adverse effects on competition is much more limited than in the domestic market, or (2) there are some special justifications not

"welcomes" the Guide's position despite "[d]oubts about the operability (if not the appropriateness) of the Guide's test."[25] Here, the author addresses the "intra-enterprise conspiracy" doctrine. He applauds the Guide's statement that "a parent corporation may allocate territories or set prices for the subsidiaries"[26] over which it "maintains effective working control"[27] whether that control springs from a majority or minority stock position.[28] Hawk would substitute a broader and more flexible approach for the control standard, but his chief complaint is directed toward the Guide's further statement that the Sherman Act will still "reach coercive attempts by members of a corporate group to drive third parties out of business or out of markets."[29] This limitation is found particularly troublesome because it is devoid of criteria for separating lawful expansion of market share from unlawful conspiracy. Hawk correctly queries: "Is it logical to assert that even though the parent controls the subsidiary the two can still conspire if their intent is to lower prices in order to drive out competitors but not if their intent is to raise prices?"[30] This query is well-taken but Hawk's further criticism "[h]ow, and to what extent if at all, does a pre-existing stock affiliation between potential competitors affect the analysis,"[31] seems to miss the point. One wonders if Hawk is still referring to parent-subsidiary arrangements here. The Guide's statement is directed at affiliated companies and seems clearly intended to say that the Sherman Act will continue to apply to coercive parent-subsidiary combinations to drive competitors out of business. Hence, the pre-existing stock affiliation is immaterial.

Nevertheless, Hawk's examination of the intra-enterprise issue also leads him to complain that "another defect in the Guide is its failure to sufficiently identify the criteria for distinguishing between 1) a general cartel scheme and 2) a unilateral decision to establish foreign subsidiaries."[32] Hawk has uncovered here a significant flaw, but his elaboration on the issue unfortunately detracts from his point. The immediately following sentence states: "[I]t is highly questionable whether the existence of pre-existing stock affiliation, used in the Guide to distinguish *Timken*,[33] should always be the determinating fac-

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to basic horizontal restraints designed to affect U.S. market prices or conditions or to divide the U.S. market from other markets. (Footnote omitted.)

INT'L ANTITRUST GUIDE, *supra* note 15, at E-1.

25. Case A dealing with the intra-enterprise conspiracy doctrine. *Id.* at 91-93.
26. INT'L ANTITRUST GUIDE, *supra* note 15, at E-4.
27. *Id.*
28. *Id.*
29. *Id.*
30. HAWK, *supra* note 2, at 93.
31. *Id.*
32. *Id.*
33. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

tor."[34] Yet, nowhere does the Guide state that unilateral decisions to establish foreign subsidiaries are always distinguishable from general cartel schemes by the existence of prior stock affiliation. Moreover, *Timken* was distinguished because the anticompetitive restraints there involved long preceded the stock affiliation.[35] It is unlikely that Hawk intends to suggest that territorial and price agreements between nonaffiliated companies should be treated the same as those between parent and subsidiary. Hawk's point is not entirely clear.

The book has other weaknesses beyond its occasional confusion in analysis of the International Antitrust Guide. Hawk sometimes makes statements assumed to be self-evident, but which are not. For example, Hawk argues that "[w]hile the general rules applicable in the purely domestic situation apply to a foreign manufacturer distributing within the United States, the manufacturer's status as a *foreign* competitor could be a factor in some situations" because "territorial or customer restrictions may be more justifiable or 'reasonable' if necessary or helpful to overcome barriers to entry into the United States market."[36] How? One can quickly see that territorial restrictions might affect a foreign firm's willingness to enter but this does not relate to what is generally meant by the phrase a "barrier to entry." A factor whose presence constitutes a condition for entry for one firm may not be a prerequisite for any others and hence its absence would not constitute a barrier to entry in the real sense. The relationship between territorial and customer restrictions and entry barriers which Hawk assumes to be self-evident is not at all clear. It is also not clear that the desire to limit dealers' territories or customers is greater for a foreign entrant than for a market-expanding domestic entrant.

The book has other shortcomings as well. Hawk's analysis of vertical arrangements involving the distribution of imports into the United States is weak because it is too cavalierly treated in a page-and-a-quarter. This is also true of his treatment of the vicarious liability of an American parent for the anticompetitive conduct of its foreign subsidiaries. This issue deserves more than the two-and-a-half pages accorded it.

While it is possible to find criticisms of the book if one looks for them, it is still clear that Hawk has authored a very fine treatise. He deserves commendation and his book deserves attention.

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34. HAWK, *supra* note 2, at 93.

35. The Guide states, "The preexisting territorial agreement between Timken and Vickers interests . . . could not be saved by a subsequent stock affiliation."

36. HAWK, *supra* note 2, at 187-88.